

Appendix

(Excerpts from the Court of Criminal Appeals' Decision)

**IN THE TENNESSEE COURT OF CRIMINAL APPEALS
AT JACKSON
NOVEMBER 1996 SESSION**

STATE OF TENNESSEE,)	
)	
Appellee,)	C.C.A. NO. 02C01-9510-CR-00293
)	
V.)	SHELBY COUNTY
)	
CLARENCE C. NESBIT,)	Honorable ARTHUR T. BENNETT , Judge
)	
Appellant.)	(Capital First Degree Murder)

For the Appellant

A. C. Wharton
District Public Defender
201 Poplar Ave., Suite 201
Memphis, TN 38103-1947

W. Mark Ward
Ronald S. Johnson
Betty J. Thomas
Assistant Public Defenders
147 Jefferson, Suite 900
Memphis, TN 38103

For the Appellee

John Knox Walkup
Attorney General and Reporter

John P. Cauley
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

William Gibbons
District Attorney General

Thomas D. Henderson
Jennifer Nichols
Asst. District Attorneys General
201 Poplar Ave.
Memphis, TN 38103

OPINION FILED: April 22, 1997

FIRST DEGREE MURDER CONVICTION AND DEATH SENTENCE AFFIRMED

David G. Hayes

Judge

OPINION

ANALYSIS

SUFFICIENCY OF THE EVIDENCE

In his first issue, the appellant contends that the evidence adduced at trial is insufficient as a matter of law to sustain the jury verdicts returned in both the guilt and penalty phases of his trial. Specifically, the appellant argues that the evidence presented failed to establish, beyond a reasonable doubt, the requisite elements of premeditation and deliberation. Additionally, the appellant argues that the single gunshot wound to the victim's head does not support the application of the "heinous, atrocious, and cruel" aggravating factor. Tenn. Code Ann. § 39-13-204(i)(5).

When there is a challenge to the sufficiency of the convicting evidence, this court must review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875

S.W.2d 253, 259 (Tenn. 1994), cert. denied, -- U.S. --, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e). We do not reweigh or reevaluate the evidence; these are issues resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Furthermore, a guilty verdict accredits the testimony of witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). The appellant bears the burden of proving that the evidence was insufficient to support the jury verdict in his case. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). See also State v. Brown, 836 S.W.2d 530, 541 (Tenn. 1992) (“the cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence@). The weight to be given circumstantial evidence and A[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.’@ Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted). In this case, both direct and circumstantial evidence was available for the jury's consideration.

GUILT PHASE

Once a homicide has been proven, it is presumed to be second degree murder, and the State has the burden of establishing first degree murder. Brown, 836 S.W.2d at 543. First degree

murder not committed in the perpetration of a statutorily designated crime requires the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1991). Thus, the State must prove premeditation and deliberation to raise the offense to first degree murder. Brown, 836 S.W.2d at 543. Premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-201(b)(2) (1991). Deliberation requires a "cool purpose . . . formed in the absence of passion or provocation." Brown, 836 S.W.2d at 538 (citations and internal quotations omitted); Tenn. Code Ann. § 39-13-201(b)(1); Sentencing Commission Comments, Tenn. Code Ann. § 39-13-201. Deliberation also requires "some period of reflection during which the mind is free from the influence of excitement. Brown, 836 S.W.2d at 538; see also Tenn. Code Ann. § 39-13-201(b)(2).

Again, although the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995), the jury may infer premeditation and deliberation from the circumstances surrounding the killing. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); Taylor v. State, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973). Our supreme court has delineated several circumstances that may be indicative of premeditation and deliberation, including the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, declarations by the defendant of his intent to kill the victim, and the making of preparations before the killing for the purpose of concealing the crime. Brown, 836 S.W.2d at 541-542. This court has also recently noted several factors from which the jury may infer the two elements, including planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the

killing. Bordis, 905 S.W.2d at 222 (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)).

The appellant argues that the only significant evidence of premeditation and deliberation presented, i.e., circumstantial evidence relating to the alleged torture of the victim, is not sufficient to establish those elements. He asserts that, even assuming that evidence of torture establishes a motive for the murder, motive standing alone is not sufficient to establish either premeditation or deliberation. Moreover, applying the Bordis factors, he contends that the injuries to the victim inflicted by torture are not relevant to the nature of the killing. The torture clearly occurred before the death of the victim. The appellant also relies upon expert testimony suggesting that torture is usually not inflicted in order to cause death. Additionally, the appellant contends that the evidence clearly reflects a lack of planning by the appellant, because, although the appellant brought a gun with him to the victim's apartment, immediately following his arrival, he unloaded the gun and placed it and the bullets on top of the refrigerator.

The appellant cites California case law to support his argument that the evidence, which could arguably establish a motive, i.e., the torture, is insufficient by itself to sustain a first degree murder conviction. See People v. Pensinger, 805 P.2d 899 (Cal. 1991); People v. Anderson, 447 P.2d 942 (Cal. 1968). The factors set forth in Bordis, however, merely provide guidelines for the reviewing court. The ultimate question remains whether the evidence, circumstantial or direct, can support a rational jury's finding beyond a reasonable doubt.

In response to the appellant's argument, the State asserts that the evidence does in fact

prove beyond a reasonable doubt that the appellant planned the murder and killed the victim in accordance with his plan. The State argues, contrary to the appellant's claim, that the killing was part of a "torture sequence that occurred over a long period of time." The evidence before the jury, when viewed in the light most favorable to the State, supports the guilty verdict beyond a reasonable doubt. The proof establishes that the appellant obtained a gun immediately prior to his visit to the victim's apartment. The appellant inflicted separate and distinct injuries upon an unarmed victim over a six hour period preceding her death. The appellant's demeanor was one of calmness following the murder. Calmness immediately after a killing may be evidence of a cool, dispassionate, premeditated murder. West, 844 S.W.2d at 148 (citing State v. Browning, 666 S.W.2d 80, 84 (Tenn. Crim. App. 1983); Sneed v. State, 546 S.W.2d 254, 258 (Tenn. Crim. App. 1976)). Moreover, the evidence shows that the appellant hid the murder weapon and returned to the scene in a different vehicle. The fact that the concealment occurred immediately after the killing "supports the theory that the appellant committed the killing [in the absence of passion]." Id.

Having reviewed the entire record, we conclude that a rational trier of fact could have found the essential elements of premeditated first degree murder beyond a reasonable doubt. Tenn. R. App. P. 13(e). This issue, therefore, is without merit.

PENALTY PHASE

INTRODUCTION OF APPELLANT'S BEEPER AND MONEY

Next, the appellant contends that the trial court erroneously permitted the introduction into evidence of his beeper and \$602.00 in cash, which were found on his person at the time of

his arrest. Specifically, he argues that the admission of these items was irrelevant and unduly prejudicial, because it suggested to the jury that the appellant was involved in illegal drug activity. Tenn.R.Evid. 403; see also State v. Banks, 564 S.W.2d 947 (Tenn. 1978).

The State initially sought to introduce the contested evidence “simply to show what was found on [the appellant] and discount any robbery motive.” The appellant made a contemporaneous objection, which was overruled, claiming that the evidence was irrelevant to the issue of premeditation. Under Rule 402, “all relevant evidence is admissible except as provided . . . Evidence which is not relevant is not admissible.” Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

The State also argues on appeal that the appellant’s testimony adequately justified his possession of the beeper and currency. Both items in question were introduced by the State during its case-in- chief. The appellant subsequently testified that he went to the victim’s apartment the night before the murder in response to a “beep” he received from the victim. Regarding the \$602.00 in cash, the appellant testified that he had been saving money he had earned from several odd jobs.

We agree that the introduction of the beeper and \$602.00 in cash was not relevant to the existence of any issue that the jury was required to decide and, thus, was improperly admitted. We conclude, however, that the appellant was not unfairly prejudiced by their admission.

Nothing in the record before us suggests that the appellant was involved in illegal drug activity. The appellant's testimony sufficiently explained his possession of the contested evidence. Accordingly, we find that any error in admitting the beeper and currency was harmless. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

INSTRUCTION ON FLIGHT

The appellant contends that the trial court incorrectly provided the jury with an instruction on flight. Specifically, he argues that his ultimate return to the crime scene negated any inference that he intended to flee. The State asserts that the instruction was properly given, noting that the instruction provides that flight, in and of itself, is not evidence of one's guilt. The trial court's instruction on flight mirrors the instruction found in T.P.I. -- Crim. § 37.16. The court instructed the jury that whether the appellant fled was a question solely for their decision that they need not infer flight, and that flight alone was insufficient to prove guilt. In this case, the evidence demonstrated that the appellant did indeed leave the scene of the murder and hide the weapon. He returned in a different vehicle and was about to leave the scene again when he was apprehended. We find no error in the submission of this instruction to the jury.

CLOSING ARGUMENT DURING GUILT PHASE

The appellant also contends that the prosecutor committed reversible error by interjecting personal opinions during his closing argument. The State contends that the argument was proper, or, in the alternative, merely harmless error.

Closing arguments are an important tool for both parties during the trial process.

Consequently, attorneys are usually given wide latitude in the scope of their arguments, see Bigbee, 885 S.W.2d at 809, and trial courts, in turn, are accorded wide discretion in their control of those arguments. See State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App.), perm. to app. denied, (Tenn. 1995). Moreover, a trial court's finding will not be reversed, absent an abuse of that discretion. State v. Payton, 782 S.W.2d 490, 496 (Tenn. Crim. App. 1989) (citations omitted). Such scope and discretion, however, is not completely unfettered. To determine whether the prosecutor committed reversible misconduct during closing argument, the reviewing court must ascertain “whether the improper conduct could have affected the verdict to the prejudice of the defendant.” Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965); see also Judge v. State, 539 S.W.2d 340, 343 (Tenn. Crim. App. 1976). Five factors should be considered in making this determination: 1) the conduct complained of, viewed in light of the facts and circumstances of the case; 2) the curative measures undertaken by the court and the prosecutor; 3) the intent of the prosecutor in making the improper statement; 4) the cumulative effect of the improper conduct and any other errors in the record; and 5) the relative strength or weakness of the case. State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984); Judge, 539 S.W.2d at 344.

During the State’s closing argument, the following colloquy occurred:

MR. HENDERSON: I hope at the end of all of this trial and my other trials, I guess, I can say that, as the Apostle Paul wrote --

MR. JOHNSON: Your Honor, he is putting his personal observation into closing argument.

MR. HENDERSON: It’s not my personal feelings, Your Honor.

THE COURT: Overruled. This it [sic] argument. You may proceed, Mr. Henderson.

MR. HENDERSON: I've done what I can to present the truth to you, as much of it as is possible this long after the offense and given the nature of the crime and the evidence. I submit to you that I can say that I have fought the good fight, I have run my course, I have kept the faith. I want you 12 to be able to say the same when it is over. Thank you.

Closing arguments must be temperate, must be based upon evidence introduced during trial, and must be pertinent to the issues being tried. Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App.), perm. to app. denied, (Tenn. 1995); State v. Tyson, 603 S.W.2d 748, 754 (Tenn. Crim. App. 1980). The prosecutor must not express a personal belief or opinion, but whether that qualifies as a misconduct often depends upon the specific terminology used. Coker, 911 S.W.2d at 368. The appellant claims the prosecutor expressed his personal opinion by stating he had presented the "truth" to the jury. However, the jury was instructed that it possessed the ultimate duty of deciding the "truth." Moreover, as noted by the court in Coker, if the argument contains phrases such as "I think" or "I submit," it is unlikely to be adjudged a personal opinion. Id.

The appellant further contends that the prosecutor improperly compared himself to the Apostle Paul. It is settled law in this state that references to biblical passages or religious law during a criminal trial are inappropriate. See State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994); Kirkendoll v. State, 281 S.W.2d 243, 254 (Tenn. 1955). Such references, however, do not constitute reversible error unless the appellant can clearly establish that they had some effect on the verdict. Stephenson, 878 S.W.2d at 541; Kirkendoll, 281 S.W.2d at 254. In this case, no reference to religious law was made. We conclude this isolated remark had no affect upon the verdict in this case. Moreover, we find no comparison by the prosecutor of himself to the

Apostle Paul. This issue is without merit.

INTRODUCTION OF PHOTOGRAPH

The appellant contends that the introduction of a family photograph of the victim with two of her children during the guilt phase of trial was irrelevant and was introduced solely for the purpose of inflaming the jury. Additionally, he contends that the photograph had a prejudicial effect on the jury's determination during the sentencing phase of the trial.

Tennessee courts have followed a policy of liberality in the admission of photographs in both civil and criminal cases. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). This policy translates into the rule that "the admissibility of photographs lies within the discretion of the trial court." Id. The trial court's "ruling, in this respect, will not be overturned on appeal except upon a clear showing of an abuse of discretion." Id. (citations omitted); see also Stephenson, 878 S.W.2d at 542; Bordis, 905 S.W.2d at 226. However, before a photograph may be admitted into evidence, it must be relevant to an issue that the jury must decide and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); see also Tenn. R. Evid. 401 and 403.

At trial, the challenged photograph was introduced through the testimony of the victim's sister.¹ The record indicates that the photograph was offered by the State to establish the victim's

¹At the bench conference on this issue, the State advised the court that a photograph depicting the victim alone was preferred, however, none was available.

identity as a "creature in being."² In Bolden v. State, 203 S.W. 755 (Tenn. 1918), our supreme court held that the evidence necessary "to establish the *corpus delicti* in [a homicide case] must show that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed. . . ." Thus, the State, in the present case, was required to prove, in its case-in-chief, that the person killed was the same person named in the indictment. See also 40 C.J.S. *Homicide* § 170 (1991); Annotation, *Homicide: identification of victim as person named in indictment or information*, 86 A.L.R.2d 722, 725 (1962). Thus, employing the test espoused in Banks, 564 S.W.2d at 949, we find no error in the admission of the photograph during the guilt phase of the trial.³ See, e.g., State v. Scott, 626 S.W.2d 25, 28 (Tenn. Crim. App. 1981); But see State v. Dicks, 615 S.W.2d 126, 128 (Tenn.), cert. denied, 454 U.S. 933, 102 S.Ct. 431 (1981) (pictures of homicide victim while alive should not be admitted at trial unless relevant to a material issue, although such an error may not be prejudicial to the outcome). Finally, the appellant asks this court to speculate about the effect of the photograph upon the jury during the sentencing phase of the trial. Having concluded that the photograph was admissible during the guilt phase of trial, we find no prejudicial impact during the sentencing phase. This issue is without merit.

²Under the pre-1989 criminal code, murder was defined as the unlawful killing of "any reasonable creature in being." See Tenn. Code Ann. § 39-2-201 (repealed 1989). Thus, in the prosecution of any homicide, proof that the deceased was a "reasonable creature in being," that is, to say a child that was born alive, was a material element of the offense of murder. See Morgan v. State, 256 S.W.433, 434 (Tenn. 1923). The phrase "reasonable creature in being" has no application to our current criminal code. The 1989 criminal code defines the killing of "another" to include a viable fetus of a human being. Tenn. Code Ann. § 39-13-214 (1989). As such, proof of a reasonable creature in being is no longer necessary. The deceased's identity, however, remains a material element. Indeed, the *corpus delicti* must be proved beyond a reasonable doubt and the defendant's statements alone are not sufficient to establish this element. State v. Shepherd, 862 S.W.2d 557, 564 (Tenn. Crim. App. 1992).

³We recognize that proof of identity is also governed by evidentiary rules, and, where the victim's identity has already been proven, further proof may be cumulative and, therefore, inadmissible. See Tenn. R. Evid. 403.

INSTRUCTIONS ON MITIGATING EVIDENCE

Next, the appellant contends that the trial judge committed reversible error by charging all of the statutory mitigating factors, even though the appellant was not relying upon all of them in his defense. Only those mitigating circumstances raised by the evidence should be charged. Buck, 670 S.W.2d at 608. Absent a showing of prejudice, this error generally benefits the defendant and does not require reversal. Cazes, 875 S.W.2d at 267; Smith, 857 S.W.2d at 15. Although the appellant concedes that this issue has been held harmless, he disagrees with our supreme court that this error is one "beneficial" to him. Specifically, the appellant claims this "serves to undermine [his] actual mitigation, emphasizes for the jury the number of mitigating circumstances missing from the case, and further highlights the distinction between statutory and non-statutory mitigating factors."

In view of our supreme court's previous rulings, and absent any showing of prejudice, we conclude that this issue is without merit.

CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE

The appellant acknowledges that the constitutionality of the death penalty has been upheld by the Tennessee Supreme Court, but raises the following issues in order to preserve them for subsequent proceedings.

The appellant contends that (1) the death penalty statute fails to meaningfully narrow the class of eligible defendants; (2) the prosecution has unlimited discretion in seeking the death

penalty; (3) the death penalty is imposed in a discriminatory manner based upon economics, race, geography, and sex; (4) there are no uniform standards for jury selection; (5) juries tend to be prone to returning guilty verdicts; (6) the defendant is denied the opportunity to address the jury's popular misconceptions about parole eligibility, cost of incarceration, deterrence, and method of execution; (7) the jury is instructed it must unanimously agree to a life sentence, and is prevented from being told the effect of a non-unanimous verdict; (8) courts fail to instruct the juries on the meaning and function of mitigating circumstances; (9) the jury is deprived of making the final decision about the death penalty; (10) the defendant is denied the final argument during the sentencing phase; (11) electrocution is cruel and unusual punishment; and (12) the appellate review process in death penalty cases is constitutionally inadequate.

These issues have repeatedly been rejected by the Tennessee courts. See Smith, 893 S.W.2d at 908; Brimmer, 876 S.W.2d at 75; Cazes, 875 S.W.2d at 253; Smith, 857 S.W.2d at 1; Black, 815 S.W.2d at 166; State v. Boyd, 797 S.W.2d 589 (Tenn. 1990); State v. Teal, 793 S.W.2d 236 (Tenn. 1990); State v. Thompson, 768 S.W.2d 239 (Tenn. 1989).

CONCLUSION

After a thorough review of the issues and the record before us, as mandated by Tenn. Code Ann. §§ 39-13-206(b), and (c), and for the reasons stated herein, we affirm the appellant's conviction and sentence of death. We conclude that the sentence of death was not imposed in an arbitrary fashion, the evidence supports the jury's finding of the aggravating circumstance, and

the evidence supports the jury's finding that the aggravating circumstance outweighs any mitigating circumstances. Moreover, a comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.⁴

⁴No execution date is set in this opinion. Tenn. Code Ann.. § 39-13-206(a)(1) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the death sentence is upheld by the higher court on review, the supreme court will set the execution date.